FILED
APR 2 4 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-1084

In the Supreme Court of the United States

TODD RONGSTAD, AND THE VALKYRIE GROUP, LLC
Petitioners

v.

JULIE M. LASSA,
Respondent

On Petition For A Writ Of Certiorari To The Supreme Court of Wisconsin

REPLY BRIEF FOR PETITIONERS

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Respondent neither denies the importance of the questions presented nor offers any serious response to our demonstration that the decision below poses a grave threat to anonymous political speech critical of elected public officials. As confirmed by the *amici*, that decision makes it far too easy for public officials to intimidate and silence issue advocacy groups and their donors. Moreover, as *amici* attest, although cases like Rongstad's recur frequently, aggrieved defendants rarely have the resources and fortitude to absorb contempt sanctions and pursue appeals all the way to this Court. Thus, this case gives the Court an unusual opportunity to resolve longstanding conflicts on issues of vital concern.

Unable to deny these conflicts or otherwise to discount the importance of the questions presented, respondent principally argues that this case is not an appropriate vehicle with which to resolve them. Among other things, she asserts that Rongstad "failed to press [below] the interpretation of *NAACP* and its progeny that he now urges." Opp. 20-21. As we explain below, this is incorrect. But respondent does not deny that the Wisconsin Supreme Court *actually decided* each of the questions presented, in one instance acknowledging and joining the split among the lower courts. Pet. App. 29a. That alone makes the first two questions suitable for review. And respondent does not even dispute that the third question presented (about waiver of First Amendment rights) is properly preserved and merits this Court's attention.

In sum, there is no obstacle to this Court's review of the questions presented, two of which are the subject of pervasive conflicts in the lower courts, and all of which are vital to the preservation of "uninhibited, robust, and wide-open" debate concerning "public issues" and "public officials." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270. (1964).[1]

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[1] Throughout her opposition, respondent misstates or mischaracterizes the record on points that have nothing to do with the suitability of this case for review. For example, respondent asserts that Rongstad's deposition testimony contradicted the statement in his

I. The Wisconsin Supreme Court's "Preliminary Showing" Requirement Warrants Review.

Respondent does not and cannot deny the deep conflict among the federal circuits and state supreme courts on the first question presented—namely, whether a party resisting the compelled identification of association members who wish to remain anonymous must demonstrate specific harm to First Amendment interests *before* the party seeking such identification must assume the burden of demonstrating a compelling governmental interest. See also CCP *Amicus* Br. 5-9. Indeed, respondent cannot deny that the Wisconsin Supreme Court itself expressly acknowledged that its decision conflicted with the decisions of other courts on this issue. Pet. App. 29a. Nor does she seriously attempt to defend the Wisconsin Supreme Court's ruling on the merits.

1. Respondent argues principally that the Court should not review this issue because, she claims, Rongstad failed to properly raise the issue below. Opp. 20-21. In fact, Rongstad raised the issue repeatedly.[2] But in any event, this Court has

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affidavit that Rongstad had conversations with Alliance members about the lawsuit. Opp. 7. However, the very deposition testimony that respondent cites for this proposition indicates otherwise. *See* Resp't App. 29a: ("I've certainly had discussions with members about it.") Respondent also inaccurately characterizes Rongstad's attempts to pursue interlocutory appeal of the trial court's discovery and sanctions orders. Opp. 8-9. But these issues have nothing to do with the reviewability of the questions presented.

[2] For example, Rongstad argued in the Wisconsin Supreme Court that "the First Amendment protects against compelled disclosure of a political organization's membership absent a compelling justification." App. Br. 13. He further argued that "state action that '*may have the effect* of curtailing the freedom to associate is subject to the closest scrutiny'" and that "[t]he First Amendment demands heightened judicial scrutiny of a libel claim brought by a public official against critics of his official conduct." App. Br. 14, 33 (citing *NAACP* v. *Alabama*, 357 U.S. 449, 460-461 (1958) (emphasis added); *Sullivan*, 376 U.S at 264). See also Reconsideration Br. 11 ("state

repeatedly ruled that, where a state supreme court considers and disposes of a federal question, this Court may review the issue regardless of whether it has been "preserved" by the losing party. In *Orr* v. *Orr*, for example, this Court described as "elementary [the] rule that it is *irrelevant* to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided." 440 U.S. 268, 274-275 (1979) (emphasis added); accord *Raley* v. *Ohio*, 360 U.S. 423, 436-437 (1959) ("[t]here can be no question as to the proper presentation of a federal claim when the highest state court passes on it").

Respondent does not dispute (nor could she) that the court below actually decided the first question presented, concluding that Rongstad was required to make a "particularized" "preliminary factual showing" of harm to the Alliance members' First Amendment rights before respondent was required to demonstrate an overriding governmental interest in disclosure. The dissent confirmed that the court addressed and decided this issue. Pet. App. 58a. Accordingly, there would be no obstacle to this Court's review even if Rongstad had *not* raised the issue before the Wisconsin courts. See also *Payton* v. *New York*, 445 U.S. 573, 583 n.19 (1980); *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974); *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 299 n.3 (1971).

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action which *may have the effect* of curtailing the freedom to associate by disclosing the identities of members of a political group "is subject to the closest scrutiny" and will be upheld only if the State's interest in the disclosure is 'compelling'" (citing *NAACP*, 357 U.S. at 460-63) (emphasis added)); *ibid.* at 12-16 (arguing that court applied erroneous constitutional standard by requiring Rongstad to make a preliminary factual showing of harm to first amendment rights before it would consider whether respondent could show an overriding governmental interest in the disclosure). In short, contrary to respondent's suggestion, Rongstad did not "agree[] . . . with the constitutional test applied by the Wisconsin Supreme Court." Opp. 20.

2. Respondent next suggests that the expressive activity of the Alliance was not entitled to First Amendment protection because it is a "sham association." Opp. 23. But even if that were so, the Wisconsin Supreme Court did not consider any such challenge, and in fact the court's constitutional analysis was predicated on the assumption that the Alliance *was* an "association" entitled to First Amendment protections. As the court explained: "The Alliance for Working Wisconsin is a 501(c)(4) organization whose main purpose is 'to educate the public about public policy issues related to business, taxes and families in Wisconsin and a national, state and local level.'" Pet. App. 4a-5a (quoting the Alliance's articles of incorporation).

Thus, the Alliance is a paradigmatic example of a constitutionally protected expressive association. It is therefore readily distinguishable from the *ad hoc*, non-expressive collection of individuals to whom this Court denied First Amendment protection in the case cited by respondent (at 23). See *City of Dallas* v. *Stanglin*, 490 U.S. 19, 24-25 (1989) (dance hall patrons not a protected "association" where patrons did not "take positions on public questions" or perform other expressive activities).

In any event, respondent's focus on the Alliance's "membership" is misplaced. Opp. 3-4. The record reveals that the Alliance's donors would not be willing to participate in the Alliance unless their identities were kept confidential. Pet. 5-6. Whether or not these contributors are *labeled* "members" is irrelevant to the substantive question whether their associational rights were infringed by the decision below.

3. In an effort to make her discovery requests appear less intrusive, respondent also suggests that she sought to discover the identities of only those individuals who were "involved in the production and distribution of the mailer." Opp. 3. In fact, respondent sought, and the trial court ordered Rongstad to produce, the names of *all contributors* to the Alliance who gave $100 or more during 2002—even

though Rongstad had taken full responsibility for the allegedly defamatory mailer and stood ready to defend the lawsuit and pay any adverse judgment. Opp. 8, 4. The act of contributing funds to an expressive association is itself an expressive activity entitled to First Amendment protection. Respondent had no justification to infringe upon the associational anonymity of the Alliance's contributors, particularly given Rongstad's repeated deposition testimony that he alone produced and distributed the mailer. Pet. 5.

4. Respondent also contends that "the record is devoid of any evidence" showing that the disclosure she sought would chill the Alliance members from exercising their First Amendment rights. Opp. 23-24. Of course, this argument assumes that a chilling of First Amendment rights should not be *presumed* in cases such as this. But that is the very issue that has deeply divided the lower courts. See Pet. 13-17; CCP Br. 5-9. Thus, even if respondent were correct on the facts, her argument would not be a reason to deny review.

In any event, respondent does not deny that she sought the identities of contributors to the Alliance in order to name them as defendants in her defamation lawsuit. Nor does she attempt to explain why such an inherently coercive discovery request would not have a powerful chilling effect on the Alliance's contributors. As numerous courts have held, the chilling effect of such discovery is self-evident. See Pet. 23-24.

5. Finally, respondent half-heartedly suggests that, because no *additional* discovery will be propounded on any Alliance members, the decision below has "no impact on the associational rights of a single [Alliance member]," and the only issue for appeal is the "reasonableness" of the discovery sanctions. Opp. 25. This is patently false. The trial court's order compelled Rongstad to reveal the identities of all those who contributed $100 or more to the Alliance in 2002 and then sanctioned him for failing to produce that information. Accordingly, by upholding *any* sanction for such nondisclosure, the court below infringed Rongstad's First

Amendment rights, regardless of whether any further discovery occurs. And the constitutionality of that sanction is in no way "intertwined with state law on discovery sanctions." Opp. 24-25. In any event, the parties expressly reserved the right to appeal this constitutional issue in their settlement agreement, agreeing on an amount that would be paid by Rongstad in satisfaction of that sanction if its constitutionality was ultimately upheld. Wisc. R. 141 at 2.

Further, as the *amici* note, the issue of which party bears the burden of making a "preliminary showing" in these cases is unlikely to appear before this Court again any time soon. CCP Br. at 12-13. Although this issue continues to arise frequently at the trial level, it is rarely appealed because of the practical realities and structural incentives of litigation. *Ibid.* An aggrieved defendant will rarely have the resources and fortitude to absorb contempt sanctions and pursue an appeal all the way to this Court with a live controversy. *Ibid.*

In sum, none of respondent's purported grounds for suggesting that it would be "improvident" for this Court to grant review has any merit. Opp. 1. To the contrary, as we showed in the petition (and the *amici* confirm), there are several pressing reasons why this Court should decide these important constitutional issues *now*. The questions presented are of particular importance and urgency given the explosion of anonymous political and commercial speech on the internet and the corresponding proliferation of "John Doe" defamation lawsuits brought by public officials and corporations against online speakers. Moreover, as *amici* explain, this Court's recent restrictions on broadcast speech relating to candidates and elections increase the importance of anonymous political pamphleteering as an "alternative avenue" of political communication that (for now) remains relatively free of government regulation. CCP Br. 9-10 (citing *McConnell* v. *FEC*, 540 U.S. 93 (2003)). Thus, the harm caused by the Wisconsin Supreme Court's decision and others like it is amplified in the current regulatory climate. This Court should seize this opportunity for resolving the conflict, rather than

waiting for some future petition that may be a long time coming.

II. This Court's Intervention Is Needed To Clarify That A Public Official Must Show A Viable Defamation Claim Before Obtaining Identities of Anonymous Speakers.

Respondent likewise offers no plausible reason to deny review of the second question presented. There we challenge the Wisconsin Supreme Court's ruling, in conflict with the Delaware Supreme Court and several other courts, that a public official is not constitutionally required to establish that her defamation claim is viable before the court can compel the identification of anonymous speakers. See Pet. 22-25. As shown in the petition and confirmed by the *amici*, the decision below allows public officials to use defamation lawsuits to intimidate critics, regardless of the merits of the officials' defamation claims. Pet. 1, 18-20; CCP Br. 2, 9-10; CFIF Br. 6-12, 15-17.

1. Respondent maintains that the Wisconsin Supreme Court's holding is "consistent with" the Delaware Supreme Court's holding in *Doe* v. *Cahill*, 884 A.2d 451 (Del. 2005). We anticipated and refuted this argument in the petition (at 25-27), but respondent simply ignores our arguments. As shown in the petition, although the Wisconsin Supreme Court stated that courts should "ordinarily" decide a pending motion to dismiss before imposing sanctions against a party asserting a constitutional privilege against discovery, it did not establish a constitutional *requirement* that must be applied whenever there is an assertion of a First Amendment privilege against the compelled disclosure of anonymous speakers. *Ibid.*

Rongstad's case proves this point: the court affirmed the sanctions against Rongstad while acknowledging that Rongstad had asserted a First Amendment privilege throughout the proceedings. Thus, the court's disposition of Rongstad's case indicates that its so-called "prospective rule" is discre-

tionary (as it expressly acknowledged (Pet. App. 21a)), not mandatory as the First Amendment requires.[3]

2. Respondent further argues that Rongstad failed to preserve the second question presented because he "made no constitutional objection based on timing of the motion to dismiss" before the trial court ordered the disclosure at issue. Opp. 12-17. Here, however, the court below passed on the second question, and this Court's review would be appropriate even if Rongstad had not pressed the issue. Pet. App. 15a-31a.

In any event, as explained in the petition (at 27-30), the Wisconsin Supreme Court's refusal to apply its "ordinary" rule in this case based upon a supposed waiver itself raises a First Amendment issue of sufficient import to warrant this Court's review. Respondent acknowledges (Opp. 4-5 & n.4) that Rongstad asserted a First Amendment privilege in response to respondent's discovery requests at the earliest stages of the litigation, that he promptly requested an opportunity to brief the First Amendment issues (which the trial court denied), and that he drew the trial court's attention to the decisions of this Court on the governing constitutional standards—the same decisions cited in the petition. More-

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[3] Moreover, under the court's discretionary rule, a plaintiff's obligation to show that her defamation claim is viable would be triggered only by a "pending" motion to dismiss, not by an objection to a discovery request or subpoena at the outset of the litigation (as occurred in *Cahill* and in this case). For this additional reason, the court's discretionary rule conflicts with *Cahill*.

Respondent incorrectly asserts that our argument that the Wisconsin Supreme Court's decision conflicts with *Cahill* "indicates a lack of understanding of the pleading requirements for defamation under the Wisconsin statutes." Opp. 18. But our argument on this point has nothing to do with state law pleading standards. See Pet. 26 n.13. Thus, respondent's lengthy dissertation on state pleading standards is irrelevant.

over, one week after he was served with the complaint, Rongstad requested "an adjournment of any depositions until after the court has had an opportunity to hear [his motion to dismiss]." Pet. App. 111a. A finding of waiver in these circumstances flouts this Court's presumption against the waiver of First Amendment rights. See *Fuentes* v. *Shevin*, 407 U.S. 67, 95 (1972); *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 145 (1967). Tellingly, respondent simply ignores this argument, which is the subject of the third question presented.[4]

3. Finally, respondent says that applying the Wisconsin Supreme Court's discretionary "prospective rule" to Rongstad's case "would not have changed" the result because the trial court ultimately denied Rongstad's motion to dismiss. Opp. 19, 16. This argument is baseless. The trial court did not rule on Rongstad's motion to dismiss until some four months after it sanctioned Rongstad. As noted in the petition, had Rongstad known early in the case that respondent's claims could survive a motion to dismiss, he would not have resisted the court's discovery orders and put himself in a position to be sanctioned. Respondent simply ignores this fact.

Moreover, contrary to respondent's assertion (Opp. 19), the court below did not decline to apply its so-called "prospective rule" to Rongstad's case because it "would not have changed" the result. Rather, the court held that Rongstad waived the issue by failing specifically to argue that the trial

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[4] Respondent also suggests that Rongstad failed to preserve this issue because he did not file a motion to dismiss before the court ordered sanctions and did not ask the court to stay discovery after he filed the motion. Opp. 13-15. Here again, to find a waiver on that basis is to violate this Court's strong presumption against waivers of First Amendment rights. In any event, it is unfair for respondent to fault Rongstad for, as she puts it, "delaying to file a motion to dismiss until February 11, 2003." Opp. 14. Rongstad's counsel filed his motion thirteen days after the court denied his request to stay discovery, even though he was required to defend Rongstad's deposition and argue the privilege issues on several occasions during hearings held within that period.

court was constitutionally required to decide his motion to dismiss before discovery proceeded. That holding was contrary to this Court's decisions and is the subject of the third question presented, which respondent simply ignores. Thus, the claim that the so-called "prospective rule" would not have made a difference in this case played no part in the Wisconsin court's analysis and should not be considered here.[5]

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Few principles are better established in our constitutional order than that "debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on . . . public officials." *Sullivan*, 376 U.S. at 270. The decision below represents a frontal attack on this principle. Moreover, it presents issues on which the lower courts are in conflict and which recur frequently but with little chance of Supreme Court review. The Court should take this opportunity to clarify that civil discovery may not be used to unmask a public official's anonymous critics without a prior showing that the official's defamation claim is viable or that there is a compelling governmental interest in such discovery.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[5] Nor did the court below base its decision on the claim that the trial court's sanctions were not "final" until after the trial court ruled on Rongstad's motion to dismiss, as respondent suggests. See Opp. 16, 19-20. Rather, the court acknowledged that the trial court had "already compelled discovery and ordered sanctions" long before it ruled on Rongstad's motion to dismiss. Pet. App. 22a. Indeed, *four months* before ruling on that motion, the trial court held Rongstad in contempt and sanctioned him $1000 per day until he complied with its discovery orders. By themselves, these actions infringed the First Amendment rights of Rongstad and the contributors to the Alliance.

Respectfully submitted,

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April 2007